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April 15, 1996

Office of the Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: IB Docket No. 95-59, Preemption of Local Zoning Regulation of Satellite Earth Stations, FCC 96-78

Dear Panel Members:

This firm has reviewed the proposed regulation regarding the restriction of satellite dishes (the "Proposed Regulation") drafted by the Federal Communications Commission (the "FCC"). Our firm has been involved with the representation of community associations for over 25 years and has represented countless associations across the country. As a firm which practices in the field of real estate law, with an emphasis on community association matters, we are troubled by the potential ramifications of certain aspects of the Proposed Regulation as presently written.

We understand that the Proposed Regulation states, "no restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming services over a satellite antenna less than one meter in diameter." Our primary concern with the Proposed Regulation is the portion which states that a restriction shall not be enforceable if it "impairs a viewer's ability to receive video programming services." The word "impairs" is ambiguous and is susceptible to varied interpretations.

We are concerned that community associations would find the proposed regulation ambiguous and would be uncertain as to the manner in which to draft community regulations or amend governance documents that comply with the regulation *and* protect the aesthetic standards that exist within their community.

We are also concerned that because the proposed regulation is ambiguous, courts would apply the regulation in a broad manner. If that were the case, the regulation would effectively make unenforceable any restriction upon satellite antenna that have a diameter of less than one meter.

The undesirability of such a result is evidenced by the fact that one feature inherent in community association governance is the community association's ability to provide assurances to its members that the standards of aesthetics and conduct that existed in the community when the homeowner purchased his home will be the standard that exists in perpetuity, unless by majority vote, the home owners decide to change the standard. A home owner, by purchasing a home that is subject to community association governance, demonstrates that he desires such assurances. Denying a community association's ability to regulate the standards that exist throughout the community contravenes the demonstrated intent of the purchaser and denies the purchaser's right to protected aesthetic standards, which includes the right not to see satellite antennas located upon neighboring' yards.

Over the last several years, courts have considered numerous cases related to the enforceability of restrictions regarding satellite antennas. Courts have routinely based their decisions upon whether the restriction was reasonable. For example, in Portola Hills Community Ass'n v. James, 5 Cal.Rptr.2d 580 (Cal.App. 4 Dist. 1992), the court held that a community association's complete ban on the installation of satellite dishes was *unreasonable* and, therefore, unenforceable because the satellite dish in question was not visible to other residents or the public. When there has been no evidence that an association exercised its discretion in an *unreasonable, arbitrary, or capricious* manner, courts have upheld restrictions on satellite antenna. Killearn Acres Homeowners Ass'n v. Keever, 595 So.2d 1019 (Fla.App. 1 Dist. 1992), Willow Creek Homeowners Ass'n No. 3 v. Yaeger, Civil Action No. 85CV291, Division 4, District Court, Arapahoe County, Colorado (March 5, 1985).

Courts also have considered the issue of whether restrictions on satellite dishes implicate First Amendment protections. In Latera v. Isle at Mission Bay Homeowners Association, Inc., 655 So.2d 144, (Fla.App. 4 Dist. 1995), the court held that the right to install a satellite dish is not a "fundamental" right and, therefore, restrictive covenants prohibiting satellite dishes were to be accorded a strong presumption of validity.

Taking a more moderate approach, the court in Willow Creek stated:

> A covenant which prevented any antenna for reception of transmitted signals would be such a broad infringement on a person's right to receive communications that it would not be constitutionally permissible. However, a contractual restriction that attempts to balance that individual's rights to receive communications with other homeowners' contractual rights to an aesthetically harmonious neighborhood is not as broad.

The Willow Creek court held that the property owners, who had failed to pursue suggestions by the association which would have allowed them to receive satellite signals, while protecting other home owners' rights, were on notice of the restriction and had entered into a voluntary contract. The court's holding indicates that it gave consideration to the fact that there were methods by which the home owners could receive electronic communications which would not infringe on the rights of other home owners.

As case law indicates, courts have granted associations latitude to enforce restrictions when the associations exercise their authority in a reasonable manner. We, therefore, suggest that appropriate standards for the limitation upon an association board's authority to enforce restrictions on satellite antenna are the standards by which boards are typically judged and the standards which the courts have articulated with respect to satellite antenna: the business judgment rule and the rule of reasonableness.

The business judgment rule, in essence, requires that a board act within the scope of its governing documents and with good faith to further the interests of the association, while the rule of reasonableness requires that a board limit its actions to those reasonably related to the association's purposes and to those that are reasonable in scope. Implementation of such a standard gives the association the discretion to implement restrictions which are in accordance with the standards existing throughout the community, thereby, protecting the expectations and rights of home owners.

We recommend the following as an alternative to the Proposed Regulation:

> So long as video programming services are otherwise unavailable to a viewer, no restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction which is arbitrarily applied, which is not reasonably related to purposes of the entity applying such restriction, or which unreasonably impinges upon a viewer's ability to receive video programming services over a satellite antenna less than one meter in diameter shall be enforceable.

While the alternative guarantees that no restriction will impede a viewer from receiving available video programming, it provides more protections to the contractual rights and expectations upon which home owners rely than does the Proposed Regulation. It also provides direction to home owners associations when drafting community governance documents and to courts when applying the FCC regulation.

Again, in light of the above, and other potential concerns, we would strongly suggest that the FCC give due consideration to the comments of home owners

associations, members of the real estate bar, and other interested parties. Please let us know if we can be of assistance.

Sincerely,

Anthony W. Oxley

Anthony W. Oxley
Hyatt & Stubblefield, P.C.

Users/LLM/Ltr. Re Proposed Telecommunications

Oak Park
APARTMENTS
SOUTH

April 15, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Socket No. 95-59

Dear Mr. Caton:

We write in response to the FCC's Report and Order and Further Notice of Proposed Rulemaking released on March 11, 1996, regarding preemption of certain local regulation of satellite earth station antennas, and proposing to prohibit enforcement of nongovernmental restrictions on such antennas that are less than one meter in diameter (the FNPRM"). We enclose six (6) copies of this letter, in addition to this original.

Oak Park South is in the residential real estate business. We manage 224 apartment units in Agoura, Ca.

We are concerned that the proposed rule prohibiting enforcement of nongovernmental restrictions will adversely affect the conduct of our business without justification and needlessly raise additional legal issues. We question whether the Commission has the authority to require us to allow the physical invasion of our property. We must retain the authority to control the user of our property, for several reasons.

First, the FNPRM incorrectly states that "nongovernmental restrictions would appear to be directed to aesthetic considerations." Aesthetic considerations are not trivial - the appearance of a building directly affects its marketability. Most people prefer to live in attractive communities, and the sight of hundreds of satellite antennas bolted to the outside walls and railing of apartment units would be extremely unappealing to present and future residents. Aesthetic considerations have definite economic ramifications.

Second, the weight or wind resistance of a satellite and the quality of installation may create maintenance problems and - more importantly - a hazard to the safety of residents, building employees, and passers-by. Damage to the property caused by water seepage into the building interior, corrosion of metal mounts, or weakening of concrete could lead to safety hazards and very costly maintenance and repair.

Third, the technical limitations of satellite technology create problems because all of our residents may not be able to receive certain services. It is our understanding that satellites are only positioned in certain areas, thus limiting access.

In conclusion, we urge the FCC to avoid interfering in our relationships with our residents. All of the potential problems we cite will adversely affect the safety and security of our property as well as our bottom line and our property rights. Thank you for your attention to our concerns.

Sincerely,.
Felicia D. Rahm
Property Manager

5325 Oak Park Lane, Agoura, California 91301 • (818) 707-7743

95-59

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Kay Kesler, CPM
Fred W. Prussen, CPM

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Mr. William F. Caton
Acting Secretary
Federal Communication Commission
1919 M Street, NW Room 222
Washington, D.C. 20554

Mr. Caton :
I am writing to ask you to stop an preemption rule of local zoning regulations of satellite dishes.

I currently manage just under 200 apartment units- 93 at a complex and the others are scattered through out our city in 2-25 units. I can tell you what problems those satellite dishes cause-not only do they look tacky if they are unable to be placed in a side yard, but they interfere with other people's communications.
I've had not only roof damage from permitting one company to locate a satellite dish on a roof, but the resulting water damage meant re-tuckpointing a 3 story brick wall. I ask the companies to provide me with an insurance certificate and workman's comp number- they don't have a clue what I am asking for.
Giving these companies a preemption would be giving them a license to destroy the good looks of the property, ignore insurance and local city requirements and interfere with a neighbors ability to earn a living. I do not see any public good arising from this preemption.

Sincerely,
Kay Kesler